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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SOPHIA MARIA SANCHEZ,

Defendant and Appellant.

E070718

(Super.Ct.No. 16CR027536)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steve Malone, Judge. Affirmed in part, remanded with directions in part.

Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Tami Hennick, and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant, Sophia Maria Sanchez, and her cohort committed a robbery and carjacking with the use of a firearm. Pursuant to a negotiated disposition, defendant pleaded no contest to assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 4).¹ She also admitted that she had suffered one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), one serious felony conviction (§ 667, subd. (a)(1)), and one prior prison term (§ 667.5, subd. (b)). In return, the remaining offenses and enhancement allegations were dismissed, and defendant was sentenced to a stipulated term of 14 years in state prison with 1,398 days of credit for time served as follows: the upper term of four years on count 4, doubled to eight years due to the prior strike conviction, plus five years for the prior serious felony conviction, plus one year for the prior prison term.

On appeal, defendant contends she is entitled to relief under recently enacted Senate Bill No. 1393 (hereafter Senate Bill 1393), which became effective on January 1, 2019, and amends sections 667 and 1385 to give trial courts the discretion to strike five-year prior serious felony enhancements. Specifically, she maintains because Senate Bill 1393 applies retroactively before a judgment is final, the matter must be remanded to the superior court to allow the court to exercise its discretion whether to strike the five-year prior serious felony enhancement. The People agree Senate Bill 1393 applies

¹ All future statutory references are to the Penal Code unless otherwise stated.

retroactively to defendant, but argue remand is unnecessary in this case. Because we are unable to say with certainty how the trial court would have exercised its newly vested discretion, we will remand for that limited purpose. Accordingly, we vacate the sentence and remand for resentencing, but affirm the judgment of conviction in all other respects.

II

FACTUAL AND PROCEDURAL BACKGROUND²

On June 1, 2016, the victim was at a residence with defendant and codefendant Ramon Ruiz. While at the residence, defendant pointed a firearm at the victim and demanded that the victim return the money the victim had taken from defendant. In addition, as defendant led the victim out to the driveway to the victim's car where defendant believed the victim had money, defendant struck the victim in the head with the firearm. The victim escaped while defendant and codefendant argued over the firearm and keys to the victim's vehicle.

On March 8, 2017, a third amended information was filed charging defendant with kidnapping for carjacking (§ 209.5, subd. (a); count 1), carjacking (§ 215, subd. (a); count 2), second degree robbery (§ 211; count 3), assault with a firearm (§ 245, subd. (a)(2); count 4), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 7).³ The information also alleged that in the commission of counts 1, 2, and 3, defendant personally used a firearm within the meaning of section 12022.53,

² The factual background is taken from the preliminary hearing transcript.

³ Codefendant Ruiz was charged in counts 1, 2, 3, 4, 5, and 6.

subdivision (b), and in the commission of count 4, defendant personally used a firearm within the meaning of section 12022.5, subdivision (a). The information further alleged that defendant had suffered one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), one prior serious felony conviction (§ 667, subd. (a)(1)), and three prior prison terms (§ 667.5, subd. (b)).

On February 9, 2018, pursuant to a negotiated disposition, defendant pleaded no contest to count 4. She also admitted that she had suffered one prior strike conviction, one prior serious felony conviction, and one prior prison term. In exchange, defendant was promised a stipulated term of 14 years in state prison, and the People agreed to dismiss the remaining charges and enhancement allegations.

On May 30, 2018, the trial court sentenced defendant in accordance with her plea agreement to the upper term of four years on count 4, doubled to eight years due to the prior strike conviction, plus five years for the prior serious felony conviction, plus one year for the prior prison term, for a total term of 14 years in state prison. The remaining charges and enhancement allegations were dismissed. Defendant was awarded 1,398 days of credit for time served.

On June 14, 2018, defendant filed a timely notice of appeal, and did not obtain a certificate of probable cause.

III

DISCUSSION

Defendant claims that because her case is not yet final and Senate Bill 1393 applies retroactively, the judgment should be reversed and the matter remanded for resentencing to allow the trial court an opportunity to exercise its discretion to strike the prior serious felony enhancement. The People agree Senate Bill 1393 applies retroactively in this case, but insist defendant is not entitled to the requested relief because her plea bargain contained a stipulated sentence of 14 years and she was sentenced in conformity with the negotiated plea. The People thus believe “the circumstances here demonstrate that the trial court would not have struck the serious felony prior enhancement, even if it had the discretion to do so.”

Initially, defendant did not need to obtain a certificate of probable cause. As a general rule, a criminal defendant who enters a guilty or no contest plea with an agreed-upon sentence may not challenge that sentence on appeal unless he or she first obtains a certificate of probable cause from the trial court. (§ 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 76.) However, based on the foundation of *Harris v. Superior Court* (2016) 1 Cal.5th 984 (*Harris*), courts have held that a certificate of probable cause was not required in cases raising Proposition 57 and Senate Bill No. 620 issues, even though the defendants had entered into agreed-term plea agreements. (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 53 (*Hurlic*) [Senate Bill 620]; *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1078 [Proposition 57].) Like the statutory change in *Hurlic*, the statutory

amendment in the present case was not anticipated when defendant entered her plea agreement. As such, defendant's present appeal is not a challenge to the validity of the plea itself.

Here, defendant admitted that she had suffered a prior serious felony conviction. Accordingly, the trial court imposed a consecutive five-year term under section 667, subdivision (a)(1), as it was statutorily required to do at the time of defendant's sentencing, and pursuant to defendant's plea agreement. (Former § 667, subd. (a)(1)) Former section 667, subdivision (a)(1), provided: "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." In addition, former section 1385, subdivision (b), stated: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." On September 30, 2018, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

In *Garcia*, *supra*, 28 Cal.App.5th 961, this court agreed with the position taken by both defendant and the People and held that, because nothing in Senate Bill 1393 suggests any legislative intent that the amendments apply prospectively only, “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019.” (*Id.* at p. 973; see *People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) Under *In re Estrada* (1965) 63 Cal.2d 740, when the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date. (*Id.* at pp. 745-747.) Accordingly, as we explained in *Garcia*, because defendant’s judgment is not yet final, we agree with the parties that Senate Bill 1393 applies retroactively in this case.

Defendant argues that since Senate Bill 1393 applies retroactively in her case, a remand is necessary to allow the trial court an opportunity to exercise its discretion to strike the prior five-year serious felony enhancement. The People argue that remand is unnecessary and would be futile because, based on the parties’ 14-year agreement, there is “[n]o [r]easonable [p]robability” the trial court would exercise its discretion and strike the prior serious felony conviction. The People state, “While it is unclear as to whether the trial court would have imposed the serious felony prior if it believed it had the discretion to do so, remand would serve no purpose,” because the trial court accepted the

plea agreement and imposed a 14-year aggregate term to implement the parties' agreement, and defendant received the benefit of her negotiated plea bargain. We conclude that remand is necessary.

We initially note the general standard for assessing when remand is required for a trial court to exercise sentencing discretion. “[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.]” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*)). However, “if “the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.”” (*Ibid.*) Courts have applied this standard in the context of Senate Bill 620, which gave trial courts discretion to strike allegations subjecting a defendant to sentence enhancements under section 12022.53, where such discretion had previously been prohibited (former § 12022.53, subd. (h)). (*McDaniels*, at pp. 424-425; *People v. Chavez* (2018) 22 Cal.App.5th 663, 712-713.) We see no reason why this same standard would not apply in assessing whether to remand a case for resentencing in light of Senate Bill 1393. The People agree that authority pertaining to Senate Bill 620 is instructive.

Furthermore, we note that plea agreements are “‘a form of contract,’ and their terms, like the terms of any contract, are to be enforced. [Citations.] Unless a plea agreement contains a term requiring the parties to apply only the law in existence at the

time the agreement is made, however, ‘the general rule in California is that the plea agreement will be “‘deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.’”’” (*Hurlic, supra*, 25 Cal.App.5th at p. 57.)

In *Hurlic, supra*, 25 Cal.App.5th 50, the court concluded that because the defendant’s plea agreement “[did] not contain a term incorporating only the law in existence at the time of execution, [the] plea agreement will be ‘deemed to incorporate’ the subsequent enactment of Senate Bill No. 620 (2017-2018 Reg. Sess.), and thus give defendant the benefit of its provisions without calling into question the validity of the plea.” (*Id.* at p. 57.) Thus, the court remanded the case to the trial court to exercise its discretion whether to lessen the defendant’s sentence pursuant to amended section 12022.53, subdivision (h). (*Id.* at p. 59; see *People v. Stamps* (2019) 34 Cal.App.5th 117, 124-125 (*Stamps*).)

Here, the plea agreement similarly did not include a term that defendant would not be subject to future changes in the law. Thus, the general rule applies, and the plea agreement should be deemed to incorporate future changes in the law, such as Senate Bill 1393. (See *Hurlic, supra*, 25 Cal.App.5th at p. 57.) Furthermore, “[i]t follows, also as a general rule, that requiring the parties’ compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory

consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law.” (*Doe v. Harris* (2013) 57 Cal.4th 64, 73-74 (*Doe*); see *Stamps, supra*, 34 Cal.App.5th at p. 123.)

In *Harris, supra*, 1 Cal.5th 984, the California Supreme Court applied *Doe* to a plea agreement that had been entered into prior to the enactment of Proposition 47, which permitted courts to resentence prior felony convictions as misdemeanors. The court held that the defendant was entitled to have his grand theft conviction resentenced as a misdemeanor and that the change in law did not permit the prosecution to withdraw from the plea agreement and reinstate the original charges. (*Harris*, at pp. 989-991.) The court explained, “The electorate exercised that authority in enacting Proposition 47. It adopted a public policy respecting the appropriate term of incarceration for persons convicted of certain crimes, including grand theft from the person. The policy applies retroactively to all persons who meet the qualifying criteria and are serving a prison sentence for one of those convictions, whether the conviction was by trial or plea. The electorate may bind the People to a unilateral change in a sentence without affording them the option to rescind the plea agreement. The electorate did so when it enacted Proposition 47.” (*Harris*, at p. 992.)

Moreover, we cannot say the record shows the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to lessen defendant’s sentence. Nothing in the trial court’s imposition of the stipulated sentence demonstrates what it would do with the newly afforded discretion under Senate Bill 1393. In addition,

the trial court’s acceptance of the negotiated sentence does not clearly establish that the court would not have exercised discretion to strike the enhancement if it had that discretion. (See *McDaniels, supra*, 22 Cal.App.5th at p. 425 [remand is not required if “the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement”]; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [remand is required when “the record does not ‘clearly indicate’ the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion”].) We conclude the trial court must be afforded the opportunity to exercise this sentencing discretion. (See *McDaniels*, at p. 425; *Garcia, supra*, 28 Cal.App.5th at pp. 973-974.)

Accordingly, we remand for the limited purpose of allowing the trial court an opportunity to consider whether to strike the section 667, subdivision (a), prior serious felony enhancement. “In exercising its discretion, the trial court is not precluded from considering whether doing so would be incompatible with the agreement on which defendant’s plea was based. If the trial court strikes the enhancement, it shall resentence defendant. In selecting an appropriate sentence, the court retains its full sentencing discretion except that it may not impose a term in excess of the negotiated [14] years without providing defendant the opportunity to withdraw [her] plea. [Citation.]” (*Stamps, supra*, 34 Cal.App.5th at p. 124, citing *People v. Wright* (2019) 31 Cal.App.5th 749, 756 [“On remand the trial court is to resentence [the defendant] in accordance with the applicable statutes and rules, provided that the aggregate term does not exceed the

stipulated sentence.”].) If the trial court does not strike the prior serious felony enhancement, it shall reinstate the sentence.

IV

DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing the trial court to exercise its discretion whether to strike or dismiss defendant’s five-year prior serious felony enhancement, and, if appropriate following exercise of that discretion, to resentence defendant accordingly and provide a corrected abstract of judgment to the appropriate agencies. The judgment is otherwise affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.